STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH M. DEAUNEE,

Plaintiff-Appellant,

v

MELISSA ESTRADA,

Defendant-Appellee.

UNPUBLISHED
May 13, 2003

No. 240636
Wayne Circuit Court
LC No. 00-026165-DC

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding the parties joint legal custody of their minor child and awarding physical custody to defendant. Plaintiff also challenges the trial court's determinations of child support and parenting time, and award of $4,700 to defendant for attorney fees and costs. We affirm in part, reverse in part, and remand for further proceedings regarding child support.

The parties were teenagers when their child was born in Michigan in 1998. The parties never married. Defendant and the child primarily resided outside of Michigan after the child was born. Plaintiff initiated a custody action in August 2000, and on December 15, 2000, obtained a default judgment awarding him custody of the child. Defendant and the child were living in Texas with defendant's new husband and his two young children at the time. Plaintiff obtained physical custody of the child in January 2001 pursuant to the default judgment, and the child thereafter resided with plaintiff at the home of plaintiff's father. Defendant subsequently returned to Michigan and moved to set aside the default judgment.

The trial court treated defendant's motion to set aside the default judgment as a post-judgment petition to change custody. At a hearing on the motion on February 16, 2001, the court orally announced that, pending resolution of the custody dispute, it was modifying the custody arrangement set forth in the default judgment and awarding defendant parenting time with the child at defendant's temporary residence in Michigan. While the matter was pending, the parties followed the modified parenting time arrangement. The custody dispute was referred first to a family counseling and mediation unit and, secondly, to the friend of the court. Following a recommendation that defendant be awarded custody of the child, plaintiff requested a de novo hearing before the trial court. Following a bench trial, the court awarded the parties joint legal custody of the child, but awarded physical custody to defendant.

On appeal, plaintiff first argues that the trial court committed clear legal error by making findings of fact concerning the allegations in his August 2000 complaint. Because plaintiff does not cite any supporting authority in support of this argument, we decline to consider it. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

Plaintiff next argues that the trial court committed clear legal error by not clearly deciding whether an established custodial environment existed or the appropriate burden of proof to be applied. Although the trial court's discussion of these issues was not artfully stated, we conclude that plaintiff has not shown legal error warranting a remand. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001).

As a threshold matter, plaintiff asserts that the trial court would not have been required to decide the issue of an established custodial environment and the corresponding burden of proof had it not changed custody pursuant to *Rossow v Aranda*, 206 Mich App 456; 522 NW2d 874 (1994). Because this claim is outside the scope of plaintiff's stated issue, and is given only cursory treatment in plaintiff's brief, we need not address it. *Eldred, supra* at 150; *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

Turning to the specific issue raised by plaintiff concerning the adequacy of the trial court's decisions regarding the existence of an established custodial environment and the burden of proof, the material question is not whether the court made a "clear decision," but rather, whether it is apparent from the court's findings of fact and conclusions of law that the court was aware of the issues and correctly applied the law. *LaFond v Rumler*, 226 Mich App 447, 458; 574 NW2d 40 (1997). Brief, definite, and pertinent findings and conclusions on contested matters are adequate. *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994).

Whether an established custodial environment exists for purposes of MCL 722.27(1)(c) depends not on the reasons for the environment, but rather upon "a custodial relationship of sufficient duration in which [the child] was provided the parental care, discipline, love, and guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which relationship between the custodian and the child is marked by qualities of security, stability, and permanence." *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). If an established custodial environment is found with one or both parents, the party seeking to change custody bears the burden of presenting clear and convincing evidence that a change of custody serves the child's best interests. *Foskett, supra* at 6. If the trial court finds no established custodial environment, then the court may change custody if the party seeking the change of custody proves by a preponderance of the evidence that the change serves the child's best interests. *Foskett, supra* at 6-7.

Here, while the trial court's analysis of these issues could have been articulated more clearly, it is apparent that the court found that the child previously had an established custodial environment with defendant, but that the custody issue would be decided by applying a burden of proof most favorable to plaintiff in light of the circumstances that existed at the time of trial. That is, that the parties shared physical custody of the child, but no established custodial environment existed with either party and, accordingly, defendant, as the petitioner, was required to prove by a preponderance of the evidence that a change in custody served the child's best interests. *Foskett, supra* at 6-7. Because the court's findings are sufficient to establish that it

was aware of the issues and correctly applied the law, plaintiff has not shown clear legal error. *Id.* at 4-5. Any error arising from the court's failure to articulate a singular finding regarding an established custodial environment, as argued by plaintiff, was harmless because it benefited plaintiff. Hence, appellate relief is not warranted on this ground. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996); *Fletcher, supra* at 882. Further, because plaintiff has declined to brief the issue whether the trial court's findings regarding an established custodial environment are factually supported, but instead rests his argument solely on the adequacy of the court's findings regarding this issue, we do not consider the former. *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998).

Plaintiff next challenges the trial court's findings with regard to the statutory best interest factors under MCL 722.23. We conclude that plaintiff's arguments fail to present a basis for relief under either the clear legal error standard, which governs our review of the trial court's choice, interpretation, and application of the law, or the great weight of the evidence standard, which governs our review of the court's findings of fact. *Foskett, supra* at 4-5.

As a threshold matter, we reject plaintiff's challenges to the trial court's resolution of credibility issues. In this regard, we defer to the trial court's superior opportunity to judge the credibility of the witnesses who appeared before it. *Fletcher v Fletcher*, 229 Mich App 19, 29; 581 NW2d 11 (1998); *Bowers, supra* at 324. Here, plaintiff has not established any basis for disturbing the trial court's credibility determinations. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).

Examining the trial court's decision in this context, we are not persuaded that the trial court's finding that MCL 722.23(a) favored defendant because of her long-term attachment to the child is against the great weight of the evidence. *Foskett, supra* at 4-5.

Plaintiff's failure to cite any factual support for his challenge to MCL 722.23(b) precludes review of this issue. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). In any event, it was not necessary for the court to comment on every matter in evidence when announcing its findings. *Fletcher, supra* at 883. Giving due deference to the trial court's superior opportunity to assess the credibility of the witnesses' before it, its finding that factor (b) favored defendant is not against the great weight of the evidence. Further, considering the child's young age, the court's failure to specifically address the educational component of factor (b) was not error.

Plaintiff has also failed to demonstrate any basis for disturbing the trial court's findings with regard to MCL 722.23(c). This factor requires consideration of both a parent's *capacity* and *disposition* to provide medical care and other needs for a child. The evidence amply supports the trial court's finding that plaintiff, while having a greater financial capacity to provide for the child's medical care and needs than defendant, was not as disposed as defendant to do so. The trial court's conclusion that this factor favored defendant is not against the great weight of the evidence.

The next two factors challenged by plaintiff, MCL 722.23(d) and (e), have some degree of overlap. *Ireland, supra* at 465. MCL 722.23(d) "calls for a factual inquiry (how long has the child been in a stable, satisfactory environment?) and then states a value ('the desirability of

maintaining continuity')." *Ireland, supra* at 465 n 8. MCL 722.23(e) focuses on the child's prospects for a stable family environment. *Id.* at 465. Stability can be undermined in several ways, such as "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id.* at 465 n 9. Here, the evidence reflected that the child's current environment was directly related to the modified parenting time arrangement followed by the parties while this case was pending. The child's current environment was bound to change regardless of how the trial court resolved the child custody dispute because it was undisputed that defendant would return to Texas. Examining the trial court's findings concerning the child's past homes and future prospects in this context, we are unpersuaded that plaintiff has shown any basis for disturbing the trial court's findings with regard to either MCL 722.23(d) or (e).

With regard to the moral fitness of the parties, MCL 722.23(f), the focus of this factor is conduct that necessarily influences how a person functions as a parent. *Fletcher, supra* at 887. Here, the trial court went beyond the moral fitness of the parties by considering whether defendant's husband was morally fit. It resolved this issue, however, by finding that the allegations concerning defendant's husband were unproven. Although the trial court did not specifically refer to all of the matters discussed by plaintiff in connection with this issue, its failure to do so does not constitute clear legal error. *Fletcher, supra* at 883. Examining the trial court's findings as a whole, we find no basis for disturbing the trial court's determination that this factor did not favor either party. *Foskett, supra* at 5.

With regard to MCL 722.23(j), the trial court's finding that plaintiff would not nurture a relationship with defendant and her new husband if he was awarded custody is supported by plaintiff's own testimony that he feared having the child exposed to defendant's husband in Texas. Giving due deference to the trial court's determination that the claims concerning defendant's new husband were unproven, as well as the other circumstances in the case, the trial court's conclusion that this factor favored defendant is not against the great weight of the evidence. *Foskett, supra* at 4-5; *Fletcher, supra* at 29.

Finally, with regard to the domestic violence factor, MCL 722.23(k), we again emphasize that the trial court was not required to declare acceptance or rejection of every proposition argued by the parties. *Fletcher, supra* at 883. The court's decision regarding factor (k) was based on evidence involving violence toward children. The court found "some hint" that defendant acted out of frustration when the child was not obedient, but that the evidence was insufficient to find that this factor favored plaintiff. Examining the trial court's findings in their entirety and, specifically, as applied to factor (k), the court's conclusion that this factor did not favor either party is not against the great weight of the evidence. *Foskett, supra* at 5.

Next, plaintiff argues that the trial court's decision to change the child's physical custody to defendant was an abuse of discretion. Because plaintiff's argument lacks citation to supporting authority, we need not address this issue. *Eldred, supra* at 150; *Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 305; 486 NW2d 351 (1992). Regardless, having considered plaintiff's argument, we are not persuaded that the trial court abused its discretion in concluding that defendant satisfied her burden of showing that a change in custody should be ordered. *Foskett, supra* at 5.

In considering this issue, there is no arithmetic computation of the best interest factors. *Foskett, supra* at 9; *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The overriding concern is the child's best interests. *Fletcher, supra* at 29.

Here, the trial court addressed the circumstances involving defendant's stepfather by ordering that the child was not to have contact with or appear in the vicinity of defendant's stepfather. Further, it is apparent from the court's decision that it repeatedly considered the parties' respective family situations, as well as the support or hinderance that family members provided. Plaintiff has failed to show any basis for disturbing the trial court's determination not to consider any additional factor under the catchall provision in MCL 722.23(l). Further, giving due consideration to all of the best interest factors, plaintiff has not shown that the trial court's decision to change the child's custody to defendant was an abuse of discretion.

Next, plaintiff argues that the trial court abused its discretion by ordering the change of custody to take place within twenty-four hours. Because the custody change has already occurred, this issue is moot and we decline to address it. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998); *Loyd v Loyd*, 182 Mich App 769, 783; 452 NW2d 910 (1990).

Next, plaintiff argues that the trial court committed clear error by relying solely on the friend of the court's recommendation to determine his child support obligation. We agree. *Foskett, supra* at 4-5. A trial court is obligated to conduct a de novo hearing when a party timely objects to a friend of the court recommendation. See MCR 3.215(E)(3); MCL 552.507(5); *Cochrane v Brown*, 234 Mich App 129; 592 NW2d 123 (1999). The trial court may consider a friend of the court report, but the report is inadmissible as evidence unless all parties agree. *Truitt v Truitt*, 172 Mich App 38, 42; 431 NW2d 454 (1988). The trial court remains duty-bound to exercise its own judgment based on properly received evidence. *Id.* at 43. The Legislature has mandated that courts follow the Michigan Child Support Formula Manual (MCSF Manual) in determining the amount of child support. *Burba v Burba (After Remand)*, 461 Mich 637, 643; 610 NW2d 873 (2000); MCL 552.16(2).

Because the record reflects that plaintiff requested a de novo hearing before the trial court regarding child support, and the trial court's opinion reflects that it relied solely on the friend of the court's recommendation to determine child support, we vacate the support provisions of the judgment and remand the matter to the trial court for an appropriate determination of child support. *Mann v Mann*, 190 Mich App 526, 539; 476 NW2d 439 (1991). The trial court may consider additional evidence if necessary to properly determine plaintiff's child support obligation under the MCSF Manual.

Plaintiff next argues that the trial court abused its discretion by placing unreasonable restrictions on his parenting time with the child. Because plaintiff has not sufficiently briefed this issue, we need not address it. *Eldred, supra* at 150; *Norman, supra* at 260. Nonetheless, we note that the trial court's verbal admonishment that plaintiff not interfere with defendant's relationship with her husband was not a restriction on his parenting time. Rather, examined in context, it reflects an effort to encourage cooperation between the parties. Further, "[c]ourts speak through their written orders, not their oral statements." *Boggerty v Wilson*, 160 Mich App 514, 530; 408 NW2d 809 (1987). Hence, this issue does not afford a basis for relief.

We also note that the trial court's order provided plaintiff with liberal parenting time with the child in Texas, upon notice to defendant, and provided for other parenting times as the parties may agree. The restriction upon specific parenting time with the child in Michigan, for up to four one-week periods each year, "provided the Plaintiff is not working during the one (1) week periods," is a reasonable means for promoting a strong relationship between plaintiff and the child. We are not persuaded by plaintiff's cursory argument on appeal that there is any basis for disturbing the order governing parenting time. MCL 722.27a; *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993).

Finally, plaintiff argues that the trial court's award of attorney fees and costs to defendant was an abuse of discretion. We decline to address this issue because plaintiff has not provided this Court with the transcript of the hearing at which the court decided this issue or a settled statement of facts pursuant to MCR 7.210(B)(2). *Admiral Ins Co, supra* at 305; *Myers v Jarnac,* 189 Mich App 436, 444; 474 NW2d 302 (1991).

Affirmed in part, reversed in part, and remanded for further proceedings regarding child support. Jurisdiction is not retained. No costs pursuant to MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra